FINAL STATEMENT OF REASONS

Administrative Appeals (RN 02-03)

UPDATE OF INITIAL STATEMENT OF REASONS

The Board of Prison Terms (Board) has made a nonsubstantive change to the initially proposed regulatory text at CCR sections (§§) 2052(c) and 2054(a)(4) by deleting the word "effective" when referring to a decision rendered after the hearing.

Upon further review, the Board determined that the use of the word "effective" when referring to the status of the decision was redundant and unclear. Deleting this language will clarify that the prisoner or parolee must submit their appeal within "90 days of receipt of *written confirmation* of the decision," i.e., at the time they receive the transcript of the hearing.

The Economic and Fiscal Impact Statement (Form 399) submitted to the Office of Administrative Law at the initial filing of the regulations is no longer effective. A new Form 399 has been drafted to address the current fiscal impact to the Board as a result of these regulations.

LOCAL MANDATES

The Board has determined that the proposed action will have no significant impact on local agencies or school districts.

CONSIDERATION OF ALTERNATIVES

The Board has determined that no reasonable alternative considered by the Board would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulatory action.

EFFECT ON SMALL BUSINESSES

The Board has determined that the proposed amendments will not affect small businesses because they apply only to inmates and parolees of California penal institutions.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT ON BUSINESS

The Board has determined that the proposed regulations will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

FEDERAL FUNDING TO STATE

The Board has determined that the proposed amendments will have no cost or savings in federal funding to the state.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE PUBLIC COMMENT PERIOD (FROM NOVEMBER 15, 2002 through DECEMBER 27, 2002)

COMMENTER NO. 1 (Michael Brodheim, CDC #C46663)

Comments:

1(a) Commenter states that it is not clearly indicated in the Initial Statement of Reasons (under Circumstances . . .), "when prisoners'/parolees' administrative remedies will be exhausted," which is necessary because *In re Muszalski (1975) 52 Cal App.3d 500* requires that prisoners and parolees exhaust their administrative remedies prior to filing for relief in the California courts.

1(b) Commenter states that pursuant to *Johnson v. Gomez 92 F.3d 964, 967 (Ninth Cir. 1996)*, in cases of murder, the law "removes final parole decision making authority from the [Board] and places it in the hands of the governor," resulting in Board decisions being merely recommendations that need *not* be administratively appealed. Mr. Brodheim recommends that the Board amend the regulations to make it clear that it is not necessary for prisoners convicted of murder to file administrative appeals before suing for relief in the California courts.

1(c) Concerning the length of the appeal, commenter states that the "three-page limit," inclusive of supporting documentation, is inadequate for full presentation of all appeal issues.

Responses:

1(a) The Board states in the initial statement of reasons under "Circumstances . . . ," that this action is "designed to establish time frames that specify *when* their administrative remedies will be exhausted." The proposed text under § 2054(c) states that "administrative remedies . . . are exhausted after the prisoner or parolee has filed an appeal as specified in § 2052 and the . . . time limits [specified in § 2054(b)] have elapsed."

Accommodation: None

1(b) The Board's parole decision, after decision review, is a *final* decision that is separate from the Governor's review process. However, the Board may modify its final decisions in cases where a meritorious administrative appeal is timely filed. The commenter's statement that Board decisions are merely "recommendations" that "need

not be administratively appealed" is erroneous. The court's statement in *Johnson v. Gomez* (1996) 92 F.3d 964, that the Board's parole decision is not final until after the expiration of the Governor's review period, is incorrect. The Board's decision is final for purposes of its independent review of the case. The exhaustion of administrative remedies has not been satisfied until the prisoner/parolee has timely filed an appeal with the Board and the time limits specified in § 2054(b) have elapsed. The court stated in *In re Muszalski* (1975) Cal.App.3d 500 as follows: "It is well settled as a general proposition that a litigant will not be afforded relief in the courts unless and until he has exhausted available administrative remedies."

Accommodation: None

1(c) The commenter fails to specify why the three-page limit for appeals is inadequate. The commenter also mischaracterizes the limit by describing it as "inclusive of supporting documentation." The Board clarifies in § 2052 that the "application (grounds for appeal, the decision desired and all arguments in support of the appeal)" shall not exceed the front side of *six pages*. Specifically, this means that the prisoner/parolee can state their grounds for appeal, the decision desired and all arguments within *six single-sided* pages or *three double-sided* pages. As stated in § 2052(a)(3), " . . . all necessary documents and information must be attached *to the application*." This further clarifies that the attachments are not counted as being part of the six-page application. In comparison, the CDC Form 602 appeal process (defined in CCR § 3084.2) allows for completion of the form and an additional "one page continuation—front and back." Thus, CDC allows four pages (two sheets front and back) and the Board proposes a limit of six pages (three sheets front and back). Given that two double-sided pages (four sides) has proved to be a reasonable limit for CDC appeals, the Board's more generous allowance of six single-sided pages appears to be both reasonable and sufficient for prisoners and parolees to address their appeal issues.

Accommodation: None.

COMMENTER NO. 2 (Stephen Manchaca, CDC #J-26976)

2(a) § 2051—Commenter contends that the proposed amendments are neither reasonably necessary nor clear, and do not relate to what is proposed in the initial statement of reasons. The proposed amendment fails to meet the *clarity* standard in that it infers that appellants challenge Board decisions based on lack of jurisdiction or legal authority when, typically they allege that panel members have broken the law in their rendered decisions and therefore violate due process. Commenter suggests that § 2051(c) be amended to read: "The decision is illegal . . . ." This language would then be consistent with BPT Form 1040.

2(b) § 2052—Commenter contends that in order to meet *clarity* and *consistency* standards, the internal policies of the Board and the Department of Corrections (concerning the filing of appeals) must be "in sync." The proposed amendment to subsection (a)(3) impermissibly shifts the burden of attaching "all necessary documents

and information to the prisoner or parolee" when, at the same time, the Department of Corrections (CDC) has a posted policy to the prisoners "not to photocopy any exhibits which are to be submitted to any state agency."

Commenter states that proposed subsection (a)(6) should be deleted because it is inconsistent with the State Rules of Court and other provisions of law governing habeas corpus petitions. Commenter states that it is unreasonable to limit an appellant to six pages, while the courts recognize that at times, up to 50 pages may be allowed. Where BPT panels provide pro forma hearings in which the commissioner merely recites boilerplate language for the denial of suitability, allowing six pages is inadequate to address each and every obstacle that must be overcome.

Commenter suggests that subsection (c)—"Submitting the Appeal"—be more specific, stating the address of where to send the appeal, provide notice to the prisoner/parolee indicating the date the appeal was received, the file number issued, and the final date of response.

2(c) § 2054—Commenter states that subsection (a)(1) does not meet the *clarity* standards for the same reasons as provided in comment 2(a) above concerning § 2051.

Responses:

2(a) The nonsubstantive amendment to § 2051, as stated in the initial statement of reasons, is necessary to "delete redundant language" and to adequately convey the meaning that, "the board did not have the 'legal authority' to make the decision." While the main purpose of the amendments is to establish time limits for administrative appeals, other legitimate purposes include clarification of procedure, terms, nonsubstantive grammar, style, or renumbering. Since the Board is not authorized to render parole decisions inconsistent with law, the language "the board did not have the legal authority to make the decision," includes both legal authority and consistency with law. Thus, the deleted language—"the decision is illegal because"—is mere surplussage. The form (1040) was revised into simple English as required under the *Armstrong* Injunction (No. C 94-02307 CW). The regulation need not match the form exactly; it may be more specific.

Accommodation: None.

2(b) The alleged rule "not to allow prisoners to copy exhibits to be submitted to a state agency" is not a formal CDC regulation or policy. CDC's Department Operations Manual (DOM) § 54100.6 [Administrative Appeals] provides procedures for prisoner photocopying related to administrative appeals. It states, in pertinent part, that "the inmate, with assistance if needed, shall complete one copy of the CDC Form 602, attach all relevant documents and forward them, open or sealed, to the appeal coordinator . . . ." Relevant documents include classification and custody chronos, time card copies, canteen and property inventory sheets, completed CDC Form 115, Rule Violation Report, and supplemental and investigation reports." Current practice between the Board and the Department is that case records staff at the prison or parole region would provide the

necessary documents existing in the prisoner's/parolee's central file. However, the prisoner/parolee would then be responsible for providing any further documents in his or her possession which are not included in the central file. The formality and requirements of habeas corpus petitions are not comparable to the relative informality of administrative appeals to CDC or the Board. Therefore, the rules of court and other provisions of law governing habeas corpus petitions are not and should not be applicable to the Board's administrative appeals' process.

No published decision by a court with jurisdiction over California has held CDC's two double-sided page limit to be unreasonable. Therefore, the Board's more permissive standard is likely to withstand a challenge in court. The Board believes that the amendment in CCR § 2052(c), identifying CDC staff who may receive the appeal, is sufficient and requires information known or easily ascertainable by the prisoner or parolee. Acceding to the commenter's request, by listing the addresses of these staff, prisons and office buildings, would result in unnecessarily voluminous regulations. Lastly, satisfying the commenter's request that CDC and/or the Board forward the prisoner or parolee a letter of receipt, acknowledging that the appeal has been received, would not be feasible since the Board does not have sufficient resources to perform such function. However, the prisoner or parolee may communicate directly with the staff which he or she submitted the appeal to ascertain whether such has been forwarded to the Board and also the date of that transmittal. In addition, the Board's proposed amendment to CCR § 2054(b)(4)(D) provides written notice to the prisoner, if the time limits in which to answer the appeal will be exceeded. The Board's experience has been that delays in responses to administrative appeals are not usually caused by an appeal being lost or misfiled, but by incomplete appeals—those without the necessary documentation attached.

Accommodation: None.

2(c) Please see the Board's response to comment 2(a) above.

Accommodation: None.

COMMENTER NO. 3 (Charles Tyberg, CDC #D-56352)

3(a) § 2051—Commenter contends that amendments to subsection (c) violate the *necessity* standard of the Administrative Procedure Act (APA) in that "the purpose of this action is to establish time limits within which the Board will respond to administrative appeals submitted by prisoners/parolees." Further, the language deleted from subsection (c) results in a substantive change that "renders the entire subsection to be meaningless," and violates the *clarity* and *consistency* standards of the APA. Commenter suggests that subsection (c) be reworded to state, "(c) The decision results in an error of law." Commenter notes that the BPT Form 1040 states (as a "reason," on page one) that "The decision is illegal."

3(b)(1) § 2052—Commenter states that subsection (a)(3) results in a substantive change (contrary to the Board's assertions) because it shifts the technical burden of providing necessary documents onto the prisoner/parolee. Commenter contends that this revision violates the *necessity* standard of the APA because its relationship to the Board's time limits is remote; it violates the *clarity* standard of the APA because the term "all necessary documents and information" is not defined, and the substitution of "must" for "should" is vague. Commenter notes that the rules of construction at § 2000(a)(5) utilize only the terms "shall, "should," and "may." In addition, commenter contends that this amendment violates the *consistency* requirement because subsection (c) requires that the appeal be filed by submitting it to the CDC, and the BPT Form 1040 instructs "CDC Staff Only" to attach necessary documents before sending the appeal to the Board.

3(b)(2) Subsection (a)(6) is not reasonably necessary and violates the *necessity* standard because there is no relationship between page limits and the Board's time limits; a limit of six pages for the entire appeal is unreasonable and arbitrary. Commenter contends that there is "no statutorily-created administrative remedy . . . of which has a page limit."

3(b)(3) Further, commenter states that the "six-page limit" violates the *consistency* standard of the APA because it is in conflict with other provisions of law; all issues brought for judicial review must first be brought to the attention of the administrative agency and remedies exhausted prior to resorting to the courts. This page limit could prevent some prisoners/parolees from exhausting their administrative remedies because they are not able to adequately and concisely present all relevant issues which interferes with the constitutional rights of access to the courts, due process, and the petition clause of the First Amendment.

3(b)(4) The "six-page limit" also violates the *clarity* standard of the APA because the definition of "application" is vague and the regulation is open to different interpretations. Under one interpretation, after utilizing the first three pages of the BPT 1040 Appeal form, there are three more pages in which to submit additional arguments. Another possible interpretation could be that the BPT Form 1040 does not pertain to the six-page limit, since it is not defined in any rule. The nonduplication requirement has also been violated because the amendment to subsection (a)(2) adds the requirement that the appeal shall be brief.

3(b)(5) As to subsection (c), commenter contends that establishing multiple CDC recipients for the appeal is unnecessary and unreasonable. The Board does not have the statutory authority to make its regulations binding on CDC employees which violates the *authority* standard of the APA. Unless the Board has in place a Memorandum of Understanding, court order, or some other written agreement to require CDC's involvement in the appeal process, then they have also violated the *reference* standard of the APA.

3(b)(6) This amendment violates the *necessity* standard of the APA because the inclusion of CDC staff in the Board's appeal system will adversely affect the prisoner's/parolee's anticipated appeal response time. A reasonable alternative would be for the

prisoner/parolee to mail the appeal directly to the Board and defer any CDC involvement in the appeal process. The conflict between § 2052(a)(3) and § 2052(c) violates the APA's *consistency* standard.

3(c)(1) § 2054—Commenter refers to comments concerning amendment to § 2051(c) above, stating that subsection 2054(a)(1) is not reasonably necessary and recommends that the language be amended to state " . . . the decision *resulted in an error of law*." In the alternative, this subsection should remain unchanged.

3(c)(2) In regard to amendments to subsection (b), commenter claims that it is not necessary to "toll the Board's time limits until the Board Appeals Unit receives the appeal"; utilizing such bureaucracy for processing appeals would cause unnecessary delays, cutting into the Board's time limits, rather than prejudicing the appellant's right to a timely resolution of the appeal.

3(c)(3) The amendment of subsection (b)(2)(D) overlooks an important requirement—that the prisoner/parolee be notified that the Board received the appeal. Commenter recommends that the Board substitute language that would notify the prisoner/parolee that the appeal was received, and indicate when the Board's time limit will elapse. If the appeal cannot be decided within the required time, written notice shall be given to the prisoner/parolee prior to exceeding the time limit; the notice shall provide the reasons for the delay and an estimated date of completion.

Responses:

3(a) As to commenter's statement that the amendment to § 2051(c) violates the *necessity* standard of the Administrative Procedure Act (APA), please refer to the Board's response to comment 2(a) above.

Accommodation: None

3(b)(1) Please refer to the Board's response to 2(b) above. The change at subsection (a)(3) (deleting the word "should" and inserting "must") is necessary to clear up any ambiguity within the existing subsection. Further, although the Board has defined terms which are frequently stated in the regulations, it is not mandatory that these terms be used in each instance. The commenter suggests that the phrase "all necessary documents" is vague and must be defined. Given the myriad of decisions and individual case factors covered within the scope of Board appeals [see 15 CCR § 2050], attempts to further specify "all necessary documents" would be impossible and/or excessively burdensome to both staff and the reader. However, the prisoner/parolee filing the appeal, or the person assisting them, should have an understanding of the essential facts in contention that must be proved and when possible, documented.

The Board disagrees with the commenter's conclusion that the amendments providing procedures for necessary attachments are remote from the main objective—specifying time limits for appeals. Unless the requirements for the application are met, including

providing all necessary documents, the Board would not have sufficient information to make a correct decision while meeting the time limits specified. Further, specific changes to this section (2052) are necessary to apprise the prisoner/parolee of his or her rights when filing an appeal pursuant to CCR § 2057, i.e., denial of a reasonable accommodation, and to clarify who the appeal shall be submitted to at the institution, i.e., the appeals coordinator, classification and parole representative, or parole appeals coordinator.

Accommodation: None.

3(b)(2) Please refer to the Board's response to comment 1(c) above. The Board acknowledges that a definite relationship exists between selection of page limits for appeals and time limits for Board responses to the appeals. Experience has shown that appeals comprised of more pages in argument or attachments take staff longer to read, understand, research, provide adequate response, and initiate any necessary corrective action. While the Board cannot and will not be responsible to disprove the existence of a negative alleged in the comment—"no statutorily-created administrative remedy . . . of which has a page limit"—it notes that CDC has used a two-page (both sides) page limit on administrative appeals for a number of years. Myriad rules of court specify the permitted length of various pleadings. For example, Comment 2(b), above, asserts that up to 50 pages (a limit) are allowed at times for habeas corpus petitions.

Accommodation: None.

3(b)(3) Please refer to the Board's responses to comment 1(c) above. In addition, the Board notes that staff assistance in filing administrative appeals is available for those who are cognitively disabled. Please see 15 CCR § 2057. We note, 15 CCR § 3084.1(b) in accord.

Accommodation: None.

3(b)(4) At § 2052(a)(6), it clearly states that the "application" for appeal include the *grounds for appeal, decision desired, and all arguments in support of the appeal*. The language at § 2052(a)(2) stating that the appeal shall be "brief, pertinent, legible, and clearly written" is necessary to clarify that the contents of the appeal be very specific and precise and written in the most efficient manner possible. Section 2052 provides or incorporates all the requirements for filing appeals with the Board. The BPT Form 1040 is not listed because it is not required. In further response to this comment, please refer to the Board's response to comment 1(c) above.

Accommodation: None.

3(b)(5) Although there are statutes that require the Board or CDC to perform specific functions, there are many instances in which the Board and CDC must combine resources to ensure that those functions are performed in the most efficient manner. In this instance, it would not be feasible to forward appeals directly to the Board when CDC

staff at the institutions have access to the prisoner's/parolee's central file containing pertinent documentation which must be attached to the appeal. The Board meets and confers with CDC and prison reform advocates when developing regulations that affect CDC, prisoners, or parolees. The Initial Statement of Reasons concerning this subdivision elaborates on the benefits of adding additional staff positions that could accept administrative appeals. In addition, the commenter has misunderstood the purpose for the *authority* and *reference* citations pursuant to subdivisions (b) and (e) of § 11349 of the Government Code. These citations, listed under "Note" following the regulatory language, are to inform the public of the statutes or other provisions of law permitting the Board to adopt, amend, or repeal regulations.

Accommodation: None.

3(b)(6) Please refer to the Board's response to comment 3(b)(5) above.

Accommodation: None.

3(c)(1) Please refer to the Board's response to comment 2(a) above.

Accommodation: None.

3(c)(2) The Board has established its time limits based on the date that the *Board Appeals Unit receives the completed appeal*. When the appeal is submitted pursuant to § 2052(c), the appeals coordinator/representative (CDC) is responsible for attaching specific documents and then forwarding the appeal to the Board Appeals Unit. At this point, the appeal is *complete* and will be decided within the specified time frames once the Board receives it. Commencing the time period for the Board's appeal response to when the prisoner/parolee submits the appeal to CDC is not feasible. The Board cannot initiate a review of an appeal until all the necessary documents have been provided. Implementing the alternative scheme suggested by the commenter would necessitate the Board to substantially extend its new time limits. Since longer time limits tend to result in longer response times, the Board believes that the potential burden of delay outweighs the benefit of increased certainty concerning the time that administrative remedies have been exhausted.

Accommodation: None.

3(c)(3) Please refer to the Board's response to comment 2(b) above.

Accommodation: None

COMMENTER NO. 4 (Rowan K. Klein, Esq.)

(1) Commenter suggests that the Board adopt a "90-day rule" within which to respond to life prisoner appeals since the exhaustion of administrative remedies within that time (90 days) still presents a significant delay before a court action may be commenced.

(2) Commenter recommends that the Board amend CCR § 2050 where it requires a prisoner to sign an authorization for an attorney to file an administrative appeal on his or her behalf. Since no such requirement exists in a court of law, there is no reason for the Board to necessitate such practice.

(3) Lastly, commenter requests that CCR § 2055 be amended to clarify that counsel may make a telephone appeal relating to an attorney determination. Commenter contends that this is the intent of this section (2055) but that it has been interpreted differently by the Board.

Responses:

(1) Specific timeframes within which to respond to appeals were developed based on the type of appeals and the expected amount of time needed to make a reasonable determination. Appeals concerning the alleged denial of accommodation for disability are handled sooner than most since the *Armstrong* Injunction requires that these appeals be answered within 30 days. Parole revocation/revocation extension appeals comprise the majority of the appeals received and are to be answered within 90 days. This timeframe was established to balance the Board's limited resources and the short confinement periods (0 to 12 months) for parole violation charges. The 120-day timeframe within which to answer life prisoner appeals is needed due to the complexity of the issues and the review/approval process required for these appeals. A prisoner, parolee, or attorney may request that an appeal be expedited pursuant to the provisions of CCR § 2056.

Accommodation: None.

(2)-(3) Commenter's recommendations to amend CCR §§ 2050 and 2055 (described above) are outside the scope of this regulatory action; therefore, these comments will not receive consideration at this time.

Accommodations: None.